

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
EASTERN DIVISION  
NO. 4:14-CR-61-1H

UNITED STATES OF AMERICA,       )  
                                      )  
          v.                               )  
                                      )  
EMMANUEL JEROME GARDNER,       )  
                                      )  
Defendant.                            )

**ORDER**

This matter is before the court on defendant's motion to suppress. Following an evidentiary hearing on December 9, 2015, United States Magistrate Judge Kimberly A. Swank entered a memorandum and recommendation (M&R) on April 1, 2016, recommending denial of the motion. The defendant has objected, the government has responded, and this matter is ripe for adjudication.<sup>1</sup> Under Rule 59(b) of the Federal Rules of Criminal Procedure, a district judge must consider "de novo any objection to the magistrate judge's recommendation."

Defendant first argues that probable cause does not support the search warrant for the cellular telephone. However, a de novo review shows that Judge Swank's findings were correct.

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<sup>1</sup> In addition to the Objections filed by counsel, defendant also filed additional objections pro se. As defendant is represented by counsel and his objections were untimely filed, the court need consider only the objections filed both timely and by counsel. However, the court also notes that a review of defendant's pro se objections reveals the objections to be essentially the same as those filed by counsel.

Judge Swank found probable cause existed to support the issuance of the warrant although the application was deficient. However, Judge Swank correctly found that the officers' reliance on the warrant issued in this case was objectively reasonable.

Next, defendant argues the state magistrate lacked authority to issue a warrant to produce cellular records outside of his county and state. Judge Swank properly construed this argument as a "red herring." Therefore, this objection is without merit. Finally, defendant argues the officer should be required to follow the law in that he should have properly returned the executed search warrant, and because he did not, the defendant suffered prejudice. However, failing to return an executed search warrant does not justify suppression and is merely an administrative error. Defendant has failed to demonstrate any such prejudice arising from this ministerial error.

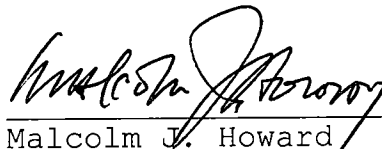
The court has carefully reviewed the objections made by defendant. The court finds these objections to be without merit. The court agrees with the magistrate judge's findings of fact as well as the conclusions of law drawn therefrom.

In addition to reviewing defendant's objections and finding them to be without merit, this court has conducted a full and careful review of the M&R and other documents of record. Having done so, the court hereby finds that the recommendation of the

magistrate judge is in accordance with the law and should be approved.

Accordingly, the court hereby adopts the recommendation of the magistrate judge as its own; and, for the reasons stated therein, the defendant's motion to suppress [DE #108] is hereby DENIED.

This 2<sup>nd</sup> day of May 2016.



Malcolm J. Howard  
Senior United States District Judge

At Greenville, NC  
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